

Margaret E. Townsend (OSB # 144463)  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211  
(971) 717-6409  
mtownsend@biologicaldiversity.org

Nicholas S. Cady (OSB # 113463)  
Cascadia Wildlands  
P.O. Box 10455  
Eugene, OR 97440  
(541) 434-1463  
nick@cascwild.org

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF OREGON**  
**PORTLAND DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY,  
and CASCADIA WILDLANDS,

Plaintiffs,

v.

FEDERAL EMERGENCY MANAGEMENT  
AGENCY, an administrative agency of the  
United States Department of Homeland  
Security, and the U.S. FISH AND WILDLIFE  
SERVICE,

Defendants.

---

Case No.:

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

(Violations of the Endangered Species  
Act; National Environmental Policy Act;  
and Administrative Procedure Act)

COMPLAINT

## INTRODUCTION

1. Plaintiffs Center for Biological Diversity (“Center”) and Cascadia Wildlands challenge the failures of Defendants Federal Emergency Management Agency (“FEMA”) and the U.S. Fish and Wildlife Service (“FWS”) to comply with the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h (“NEPA”), and Administrative Procedure Act, 5 U.S.C. §§ 701–706 (“APA”) related to FEMA’s decision to provide disaster relief funding for the Oregon Department of Forestry (“ODF”) to rebuild Cook Creek Road and reopen access to logging in the Cook Creek subbasin within Oregon’s Tillamook State Forest.

2. Cook Creek Road is a gravel road carved into steep, erosion-prone slopes that are typical of Oregon’s Coast Range. The road runs along Cook Creek, a tributary to the lower Nehalem River that provides critical spawning and rearing habitat for Oregon Coast coho salmon (*Oncorhynchus kisutch*) (“Coho”), a threatened species under the ESA.

3. During winter storms in 2015, heavy rain and high flows eroded the north bank of Cook Creek and caused a 500-foot section of Cook Creek Road to fail, pushing massive amounts of sediment downslope into Cook Creek and altering its flow pattern. The road past the washout is impassible, and no logging has occurred in the Cook Creek subbasin since the washout.

4. In 2022, FEMA approved disaster relief funding for ODF to reconstruct Cook Creek Road (the “Cook Creek Project”). With FEMA’s grant, ODF plans to reconstruct Cook Creek Road by moving the washed-out segment roughly 130 feet upslope—nearly vertical—from its prior location, constructing 1,900 feet of new road, and adding two turnouts on the steep, erosion-prone slopes along Cook Creek. Construction will cause erosion and delivery of sediment to Cook Creek.

5. ODF has planned the road construction from August 6 through October 31 in both 2023 and 2024, meaning sediment will enter Cook Creek at a time when juvenile Coho are rearing in Cook Creek and adult Coho are migrating and preparing to spawn in the subbasin.

6. Once reopened, Cook Creek Road will be an ongoing source of erosion and sediment delivery into Cook Creek. With restored logging access to the Cook Creek subbasin, ODF is planning to commence clearcutting, road building, and log hauling along steep slopes above Coho bearing streams, which will deliver sediment to Coho critical habitat into the future. These planned ODF logging projects could not occur absent the proposed road reconstruction.

7. Despite the clear impacts to Coho and their critical habitat, FEMA improperly concluded in its Biological Evaluation (“BE”) and Environmental Assessment (“EA”) that the Cook Creek Project would have “no effect” on Coho and, thus, did not consult with the National Marine Fisheries Service (“NMFS”) under section 7 of the ESA. This “no effect” determination is plainly false and fundamentally flawed. As a result, FEMA failed to comply with the substantive and procedural requirements set forth in section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and obligations under NEPA to avoid conclusions unsupported by the record.

8. FEMA also did not adequately consider the admitted “major” impacts of ODF’s planned logging, clearcutting, road building, and log hauling on resources such as water quality, fish, and birds. ODF’s actions will not only have cumulative impacts on these resources, but because they are connected to and dependent on FEMA funding the Cook Creek Project, FEMA’s failure to consider these connected and indirect effects violates NEPA.

9. FEMA’s BE and EA also concluded that the Cook Creek Project is “not likely to adversely affect” the marbled murrelet (*Brachyramphus marmoratus*)—a threatened coastal bird that depends on intact old-growth forests and has designated critical habitat throughout the

Tillamook State Forest. FEMA reached this conclusion despite admitting that road construction will occur in and adjacent to marbled murrelet habitat, that there are potential murrelet nesting trees nearby, and that Cook Creek is likely a migration corridor for the species. FEMA's conclusion also ignored that road construction increases the density of murrelet predators. Thus, FEMA's determination that the Cook Creek Project is "not likely to adversely affect" the marbled murrelet is arbitrary, capricious, and not in accordance with section 7(a)(2) of the ESA.

10. In September 2022, relying on the BE, FWS concurred with FEMA's flawed "not likely to adversely affect" determination for the murrelet. By failing to consider and apply the best available science about the direct, indirect, and cumulative effects of the Cook Creek Project and its connected actions, FWS's concurrence is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law, in violation of the APA and ESA.

11. Plaintiffs therefore seek an order from this Court vacating FWS's Concurrence and FEMA's BE, NEPA analysis and FONSI, and enjoining FEMA's decision to fund the Cook Creek Project until Defendants come into compliance with federal law.

### **JURISDICTION AND VENUE**

12. This action arises under the laws of the United States, including the ESA, NEPA, and the APA. An actual, justiciable controversy exists between Plaintiffs and Defendants, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–706.

13. Venue in this court is proper under 26 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims in this complaint occurred within this judicial district, and the public lands and resources at issue are located in this district. The Tillamook State Forest and Cook Creek are located in Tillamook County. Plaintiff Center for

Biological Diversity has offices in Portland, Oregon. Pursuant to Local Rule 3-2(b), this case is properly filed in the Court's Portland Division in Portland, Oregon.

### **PARTIES**

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a nonprofit organization dedicated to the protection of imperiled species and their habitats. The Center is headquartered in Tucson, Arizona, and has offices and staff across the country, including an office in Portland and staff throughout Oregon. The Center has more than 87,000 members, including many who live near and recreate in the Tillamook State Forest and have an interest in Coho and marbled murrelets. Because the Center values Coho, marbled murrelets, and their critical habitats, the Center places high priority on protecting and recovering these species across their ranges, which include Cook Creek within the lower Nehalem River watershed and the Tillamook State Forest.

15. Plaintiff CASCADIA WILDLANDS is a non-profit corporation headquartered in Eugene, Oregon with approximately 12,000 members and supporters throughout the United States. Cascadia Wildlands educates, agitates, and inspires a movement to protect and restore wild ecosystems in the Cascadia Bioregion, extending from Northern California into Alaska. Cascadia Wildlands envisions vast old-growth forests, rivers full of salmon, wolves howling in the backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia Bioregion. Cascadia Wildlands has long advocated to protect Coho, marbled murrelets, and their critical habitats through education, advocacy, litigation, and monitoring.

16. Plaintiffs have long-standing interests in the preservation and recovery of Coho and murrelets in Oregon, both because Plaintiffs and their members place a high value on the species and because the presence of the species is essential to the healthy functioning of Oregon's coastal ecosystem. Plaintiffs have been active in seeking to protect and recover these

species through a wide array of actions, including public outreach and education, scientific analysis, and advocacy intended to promote the healthy functioning of the ecosystem.

17. Plaintiffs bring this action on behalf of their respective organizations and their members, who are injured by harm to Oregon’s public lands, the Tillamook State Forest, the lower Nehalem River watershed—including Cook Creek and its tributaries—and the imperiled species and their habitats in these areas. Plaintiffs’ members live near and regularly use and enjoy the Tillamook State Forest and the lower Nehalem River watershed for traditional activities and recreational pursuits, including hiking, fishing, camping, wildlife viewing, photography, and aesthetic enjoyment. Plaintiffs derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from these activities.

18. An actual, present controversy exists between Plaintiffs and Defendants. Plaintiffs’ members use and enjoy the lower Nehalem River watershed and Tillamook State Forest to visit critical habitat for Coho and marbled murrelets with the goal of observing the species. For example, Center member Joyce Sherman visits Coho critical habitat in the lower Nehalem River watershed with the goal of observing Coho at least six or seven times each year and has been driving Cook Creek Road several times each year since 2014. She continues to access this area by other means now that the road is washed out, and she will be harmed by the road’s reconstruction and the logging that can only occur once the road is rebuilt. Additionally, Plaintiffs and their members have been working for decades to protect the mature forests of Oregon’s Coast Range managed by ODF with a specific focus on the marbled murrelet. The reconstruction of the Cook Creek Road will harm and drastically set back these efforts.

19. Plaintiffs’ members derive recreational and aesthetic enjoyment, as well as physical and mental health benefits, from their activities in this specific area. Their enjoyment of

these precious places depends on the health and condition of the ecosystems in this area, as well as on the health and condition of the wildlife that live in and migrate through the area. Plaintiffs' members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future. Plaintiffs' members can and do use the area despite the wash out of Cook Creek Road, and reconstructing the road will facilitate large-scale timber harvest in this basin.

20. The aesthetic, recreational, scientific, inspirational, and educational interests of Plaintiffs' members have been and will be adversely affected and irreparably injured by Defendants authorization of the Cook Creek Project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under the law. The requested relief would redress these injuries, and this Court has the authority to grant Plaintiffs' requested relief.

21. The FEDERAL EMERGENCY MANAGEMENT AGENCY is a federal agency within the U.S. Department of Homeland Security whose mission is "helping people before, during and after disasters."

22. The U.S. FISH AND WILDLIFE SERVICE is a federal agency within the U.S. Department of the Interior and is responsible for the conservation and recovery of wildlife species listed under the ESA, including marbled murrelets.

## STATEMENT OF LAW

### I. Endangered Species Act

23. The Endangered Species Act "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). As the Supreme Court recognized, "Congress intended endangered species be afforded the highest of priorities." *Id.* at 174.

24. The ESA “provide[s] a program for the conservation of ... endangered species and threatened species” and “a means whereby the ecosystems upon which [such] species depend may be conserved.” 16 U.S.C. § 1531(b). The ESA defines “conservation” as “the use of all methods and procedures, which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). To those ends, section 7 of the ESA requires all federal agencies to work to recover listed species and contains procedural and substantive requirements to do so.

25. Substantively, section 7(a)(2) of the ESA requires federal agencies to ensure that “any action authorized, funded, or carried out” is not “likely to jeopardize the continued existence” of any endangered or threatened species or “result in the destruction or adverse modification” of critical habitat. 16 U.S.C. § 1536(a)(2). In this context, to “jeopardize” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

26. To carry out section 7’s substantive mandate, the ESA sets forth mandatory procedures requiring any federal agency proposing an action (*i.e.*, the “action agency”) to consult with an expert agency—FWS for terrestrial and freshwater species or NMFS for marine species and anadromous fish, such as Coho—to determine whether the action is likely to jeopardize any listed species or destroy or adversely modify critical habitat and, if so, to identify ways to modify the action to avoid that result. 50 C.F.R. § 402.12.

27. Regulations governing section 7 consultation procedures require a federal agency to initiate consultation with FWS and NMFS whenever the agency undertakes an “action” that “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a).



28. The threshold for a “may affect” determination and the required ESA section 7 consultation is low. *See* 51 Fed. Reg. 19926, 19949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement”); *see also* U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., Endangered Species Consultation Handbook, at xvi (1998) (defining “may affect” as “the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat.”). An agency may be relieved of the obligation to consult only if the action will have “no effect” on listed species or critical habitat.

29. ESA regulations broadly define the scope of agency actions requiring consultation to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” including but not limited to “grants-in-aid” and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

30. In consultation, the action agency must first determine, including by asking FWS and/or NMFS (collectively, the “Services”), whether any ESA-listed or proposed species may be present in the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. The “action area” includes “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

31. If the action agency finds that listed species may be present in the action area, the action agency must prepare a “biological assessment” to determine whether the proposed action is likely to adversely affect the listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

32. The biological assessment must include, among other things, “[a]n analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.” 50 C.F.R. § 402.12(f)(4).

33. Effects of the action include “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action” and that “may occur later in time” or “outside the immediate area involved in the action.” 50 C.F.R. § 402.02. An agency action “causes” a consequence if it “would not occur but for the proposed action and it is reasonably certain to occur.” *Id.*

34. Cumulative effects of the action are the “effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.*

35. If an agency determines that the action “may affect” but is “not likely to adversely affect” listed species or critical habitat, and the Services concur in writing, ESA regulations permit less comprehensive “informal consultation” to satisfy section 7 obligations. *Id.* § 402.13.

36. If the Services do not concur with the action agency’s “not likely to adversely affect” determination or if the action agency determines that the action is “likely to adversely affect” listed species or critical habitat, the action agency must engage in “formal consultation” with the Services, as outlined in 50 C.F.R. § 402.14. *Id.* §§ 402.02, 402.14(a).

37. Formal consultation is “a process between the Service[s] and the Federal agency that commences with the Federal agency’s written request for consultation under section 7(a)(2) of the [ESA] and concludes with the Service[s]’ issuance of the biological opinion under section 7(b)(3) of the [ESA].” *Id.* §§ 402.02, 402.14(c)(1).

38. In formal consultation, the Services must “evaluate the effects of the action and cumulative effects on listed species and critical habitat,” when added to the “environmental baseline” and “in light of the status of the species and critical habitat,” to determine whether the action is likely to jeopardize species or destroy or adversely modify critical habitat. *Id.* §

402.14(g)(3)-(4). The “environmental baseline” must include the past and present impacts of all federal and nonfederal actions in the action area, including those that have already undergone consultation with the Services under section 7 of the ESA. *Id.* § 402.12.

39. At the conclusion of formal consultation, the Services must issue a “biological opinion” that “detail[s] how the agency action affects the species,” 16 U.S.C. § 1536(b)(3)(A), and sets forth the Services’ opinion as to whether the action is “likely to jeopardize” the continued existence of listed species, 50 C.F.R. § 402.14(h)(1)–(3).

40. If the Services determine that the action will incidentally “take” a listed species but *is not* likely to jeopardize the species or destroy or adversely modify critical habitat, the Services must provide an “incidental take statement” (“ITS”). *Id.* § 402.14(g)(7). The ITS must specify the impact of the incidental taking on the listed species, set forth any “reasonable and prudent measures” (“RPMs”) that are necessary or appropriate to minimize the impact from take, and provide “terms and conditions” that the action agency must comply with to implement the RPMs and avoid jeopardy to the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

41. If the Services determine that the action *is* likely to jeopardize listed species or destroy or adversely modify critical habitat, the biological opinion must suggest “reasonable and prudent alternatives” (“RPAs”) that would reduce the impacts of the action such that the action agency may avoid jeopardizing listed species. 16 U.S.C. § 1536(b)(3)(A).

42. If the agency action is expected to cause “take” of listed species, the Services must also include an ITS in its biological opinion that, where practicable, quantifies the amount of take allowed for each species. 50 C.F.R. § 402.14(i).

43. Take of a listed species by federal action without a valid ITS is a violation of section 9 of the ESA. 16 U.S.C. § 1538.

44. The ESA defines “take” broadly to encompass all manner of harm and harassment, including direct injury or mortality and any acts or omissions that disrupt or impair significant behavioral patterns. *Id.* § 1532(19); 50 C.F.R. § 222.102.

45. Compliance with a biological opinion and ITS protects the action agency and others acting consistent with the biological opinion from enforcement action under section 9 of the ESA’s prohibition against take. 16 U.S.C. §§ 1536(o)(2), 1538(a); 50 C.F.R. § 17.31(a). However, take that does not comply with a legally valid biological opinion or that occurs absent a valid ITS under section 7, or absent an ESA section 10 incidental take permit, violates section 9 of the ESA. *See* 16 U.S.C. § 1536(b)(4), (o)(2).

46. Federal agencies must also confer with the Services on any action that is likely to jeopardize the continued existence of species *proposed* to be listed under the ESA or result in the destruction or adverse modification of *proposed* critical habitat. 16 U.S.C. § 1536(a)(4).

47. Compliance with the procedural requirements of section 7 of the ESA—identifying the likely effects of the action through the consultation process before the action is taken—is integral to compliance with the substantive requirements of section 7 of the ESA.

48. The ESA requires formal consultation to conclude within 90 days of the date that consultation was initiated unless the Services and the action agency agree to extend the consultation for a specified time period. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

49. Federal actions that “may affect” listed species or critical habitat may not proceed unless and until the federal action agency ensures, through completion of the section 7 consultation process, that the action is not likely to cause jeopardy to the species or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.13, 402.14.

50. In order to maintain the environmental status quo pending the completion of consultation, section 7(d) of the ESA requires that during consultation, action agencies “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation of any [RPMs or RPAs]” necessary to avoid jeopardizing the species. 16 U.S.C. § 1536(d). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied. 50 C.F.R. § 402.09.

51. FEMA’s decision to provide funding to ODF to reconstruct Cook Creek Road is a federal action that requires consultation with the Services under section 7 of the ESA.

## II. National Environmental Policy Act

52. The National Environmental Policy Act is the nation’s charter for protection of the environment. Its central goals are “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

53. To these ends, NEPA requires that federal agencies analyze and disclose to the public the reasonably foreseeable environmental effects of their actions. *Id.* § 4332(C).

54. The Council on Environmental Quality (“CEQ”) promulgated NEPA regulations, binding on all federal agencies, that are primarily intended to “ensure Federal agencies consider the environmental impacts of their actions in the decision-making process.” 40 C.F.R. §§ 1500-1508. Although CEQ amended its NEPA regulations in 2020, 85 Fed. Reg. 43304 (July 16, 2020), those regulations “apply to any NEPA process begun after September 14, 2020,” and

specify that “[a]n agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020.” 40 C.F.R. § 1506.13 (2020).<sup>1</sup>

55. NEPA regulations define the “effects” or “impacts” of an action as the reasonably foreseeable “changes to the human environment from the proposed action,” including “effects on natural resources and on the components, structures, and functioning of affected ecosystems,” as well as the “aesthetic, historic, cultural, economic, social or health [effects].” 40 C.F.R. § 1508.8.

56. An agency must consider an action’s direct, indirect, and cumulative effects. 40 C.F.R. § 1508.1(g). Direct effects are caused by the action and occur at the same time and place. *Id.* § 1508.8(a). Indirect effects are the “reasonably foreseeable” effects caused by the action that occur later in time or are farther removed in distance. *Id.* § 1508.8(b). Cumulative effects are the “incremental impact[s] of the action” when “added to other past, present, and reasonably foreseeable future actions” undertaken by any person or agency and “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* § 1508.7.

57. The scope of the NEPA analysis must include “connected actions” which “are closely related and therefore should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(1). Connected actions specifically include actions that “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” or are “interdependent parts of a larger action and depend on the larger action for their justification.” *Id.*

---

<sup>1</sup> Because FEMA’s NEPA process for the Cook Creek Project began before September 2020, and because FEMA throughout the NEPA process relied on CEQ’s 1978 NEPA regulations, those regulations apply to the Cook Creek Project EA and FONSI.

58. NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4, 1502.4.

59. To determine whether an action may have significant effects requiring an EIS, an agency may prepare an environmental assessment (“EA”). 40 C.F.R. §§ 1501.4(c), 1508.9.

60. In either an EA or EIS, NEPA regulations require the action agency to “succinctly describe the environment of the area(s) to be affected or created by the alternative under consideration,” *Id.* § 1502.15, and to evaluate a reasonable range of alternatives, including a “no action” alternative, when analyzing environmental impacts of the proposed action. *Id.* § 1502.14.

### III. Administrative Procedure Act

61. The APA confers a right of judicial review on any person that is adversely affected by agency action. 5 U.S.C. § 702.

62. The APA declares that a reviewing court “shall hold unlawful and set aside agency actions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

63. An agency action is arbitrary and capricious if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation ... that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

64. The APA also requires a reviewing court to “compel an agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

65. Courts allow challenges to federal agencies' failure to comply with NEPA under the APA. 5 U.S.C. §§ 701–706.

66. While the ESA provides for judicial review of federal agencies' failure to fulfill the requirements under section 7, the APA governs the standard and scope of judicial review. 5 U.S.C. §§ 701–706.

## STATEMENT OF FACTS

### I. Threatened Oregon Coast Coho Salmon

#### A. Coho Salmon Life History and Habitat Requirements

67. Oregon Coast Coho salmon are uniquely adapted to the freshwater streams that flow into the Pacific Ocean along the Oregon Coast.

68. Like most salmon, Coho are anadromous—meaning they migrate between fresh and saltwater—and inhabit ocean waters, rivers, and streams around the northern Pacific Rim. Coho begin their life cycle in freshwater streams and small tributaries, migrate downstream to the Pacific Ocean, spend their adult life in estuarine and ocean waters, and return to the streams of their birth to spawn at the end of their lives.

69. Adult Coho re-enter freshwater September through November and spawn in November and December. Coho eggs—which females deposit into nests called “redds”—hatch in late winter or early spring. Coho remain as larva, or “alevin,” for up to seven weeks until they develop fins and the strength to feed within the water column. For the next year or two, young Coho “fry” remain in natal streams to feed, rear, and grow. Juvenile Coho then become “smolts,” whereby physiological changes make them adapted to saltwater. Smolts migrate to the estuary and out to the ocean from March through July. Coho typically remain in the ocean for about a



year and a half, feeding on small fishes and invertebrates until they can store enough energy for their return migration back to the freshwater streams of their birth to spawn and die.

70. The condition of coastal freshwater habitats determines whether fish will survive and successfully reproduce. Coho require navigable passage from the Pacific Ocean to their natal streams; stable gravel substrates for spawning and redd building; clear, clean water for spawning and feeding; pools for sheltering and feeding; and cool water temperatures. B.

#### Decline of Oregon Coast Coho and Threatened Listing

71. It is estimated that in the early 1900s, up to two million Coho returned from the Pacific Ocean to Oregon's coastal rivers to spawn each year.

72. Since the 1950s, steep declines in the Coho population have occurred due to the degradation of freshwater streams from logging, log hauling, and roads built on steep slopes throughout Oregon's coastal watersheds. By the late 1960s, Oregon's Coho population had declined by more than 90 percent, with only 45,000 to 150,000 adult Coho returning to spawn.

73. By the 1990s, the annual return of adult Coho to Oregon's coastal rivers dropped to less than 30,000 fish. Since 1994, fishery harvest limits for wild Coho have been sharply curtailed or even closed due to low population size. In 1997, the population was down to just 26,200 fish, and a 1998 assessment of the Coho population in the Tillamook Bay basin found a significant probability of extirpation due to poor-quality freshwater habitat.

74. In 1998, NMFS listed Coho salmon along the Oregon Coast—*i.e.*, the Oregon Coast evolutionarily significant unit ("ESU") of Coho—as "threatened" under the ESA. 63 Fed. Reg. 42587 (Aug. 10, 1998).

75. The Oregon Coast Coho ESU includes freshwater habitats (rivers, streams, creeks, and lakes) from the Necanicum River near Seaside to the Sixes River near Port Orford.

50 C.F.R. § 226.12(s). Critical habitat is designated throughout Oregon’s Coast Range and includes Cook Creek and its tributaries (e.g., Harliss Creek, Hoevelt Creek, and East Fork Cook Creek) within the lower Nehalem River watershed. 50 C.F.R. § 226.12(s)(vi).

76. Following several legal challenges and status reviews, NMFS reissued its decision to list the Oregon Coast Coho ESU in 2005, 2008, and 2011. *See* 70 Fed. Reg. 37160 (June 28, 2005); 73 Fed. Reg. 7816 (Feb. 11, 2008); 76 Fed. Reg. 35755 (June 20, 2011); *see also* 75 Fed. Reg. 29489–90 (May 26, 2010) (overview of ESA listing of Oregon Coast Coho ESU).

77. In 2008, NMFS issued a special rule pursuant to section 4(d) of the ESA that extends the prohibition on take in section 9 of the ESA to wild Coho (“Special Rule”). *See* 50 C.F.R. § 223.203 (2017). NMFS reissued the Special Rule in 2011. 76 Fed. Reg. 35755, 35770 (June 20, 2011).

78. The Special Rule identifies road construction and logging as activities subject to section 9 of the ESA’s prohibition on take. 50 C.F.R. § 223.203. In particular, “activities that ... could potentially take salmon by harming them”—like “logging,” “road construction in riparian areas” and areas “susceptible to mass wasting and surface erosion,” and the “removal of large woody debris and ‘sinker logs’ or riparian shade canopy”—harm Coho and, thus, “result[] in a violation of the section 9 take and other prohibitions.” 73 Fed. Reg. 7816, 7830 (Feb. 11, 2008).

79. In the 2016 Recovery Plan for Oregon Coast Coho, NMFS identified “logging” and “roads” as direct threats to Coho and reiterated ongoing “significant concerns” about the inadequacy of ODF’s rules, policies, and procedures to protect Coho from the harmful effects of logging and road construction on state forest lands across the Oregon Coast Coho ESU.

II. Threatened Marbled Murrelets

A. Marbled Murrelet Life History and Habitat Requirements

80. The marbled murrelet is a small diving sea bird found only on the Pacific Coast of North America, from southern Alaska and the Aleutian Archipelago to central California.

81. Murrelets spend most of their lives foraging in the nearshore marine environment for small fish and invertebrates but fly inland to nest in mature and old-growth conifer forests.

82. Murrelets do not build nests but instead lay their eggs on thick, flat tree branches with natural depressions blanketed by moss. Because the availability of these naturally occurring nest platforms is the most important characteristic of their nesting habitat, marbled murrelet nesting sites are closely associated with intact mature and old-growth forests.

83. Murrelets do not nest every year, but when they do, they often return to the same forest stand and even the same nest tree, which can be up to 50 miles from the ocean in interior forests. The female lays a single egg, and the male and female incubate the egg by switching shifts while the other bird flies back and forth to the ocean to feed, typically at dawn or dusk. The adult birds take turns carrying fish from the ocean to feed the chick, at least once per day.

84. Marbled murrelet nesting begins mid-April and ends in late September, when young fledglings have left the nests.

85. To successfully reproduce, murrelets need large unfragmented blocks of mature forest habitat. Murrelet habitat use during the breeding season is positively associated with the presence and abundance of large core areas of old-growth and low amounts of “edge habitat.”

86. “Edge habitat” is most frequently created by logging and road construction and is detrimental to murrelet breeding. Tree removal drastically alters interior forest microclimates the murrelet depends upon for nest sites, and forest edges attract higher densities of predators. As a

result, logging and road construction harms murrelets not only by directly removing nest trees, but also by fragmenting the forest and degrading habitat patches by increasing the number of predators, thus increasing the odds of nesting failure and predation. The fragmentation that results from logging and road construction causes local or regional extinctions, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival. Road construction in particular frequently results in trash dumping or littering, which can dramatically increase the density of murrelet predators in an area.

**B. Decline of Marbled Murrelets Due to Logging of Old-Growth Coastal Forests**

87. The continued logging and roading of old-growth coastal forests in Oregon has eliminated and fragmented most of the murrelet's historic nesting and breeding habitat along the Pacific coast, resulting in steep declines in the species' population.

88. In 1992, FWS listed marbled murrelets in Oregon, Washington, and California as threatened under the ESA due to the "loss and modification of nesting habitat (older forests) primarily due to commercial timber harvesting." 57 Fed. Reg. 45328 (Oct. 1, 1992). In its listing decision, FWS identified the "principal factor affecting the marbled murrelet ..., and the main cause of population decline" as the "loss of older forests and associated nest sites." *Id.* at 45330.

89. In 2010, FWS reaffirmed that murrelets "continue[] to be subject to a broad range of threats, such as nesting habitat loss, habitat fragmentation, and predation." 75 Fed. Reg. 3424.

90. FWS designated critical habitat for the marbled murrelet in 1996, which includes forest lands in Oregon's Coast Range and in the Tillamook State Forest.

91. FWS's decisions affirmed that, in addition to direct removal of old-growth forest habitat and nest trees, murrelets are particularly harmed by habitat fragmentation caused by

logging because they depend on large blocks of interior habitat for protection from predators, microclimate changes, and windthrow of nest trees. Logging fragments habitat, reduces interior or core habitat, and increases the amount of forest edge, isolates remaining habitat patches, and creates “sink” habitats. This can harm marbled murrelets by causing effects on population viability and size, local or regional extinctions, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival.

92. Predation and nest failure are substantial threats to marbled murrelets and increase with the fragmentation of older-aged forests, and nest success is lower in small forest fragments.

93. Due to these risks, FWS has advised that old-growth coastal forest nest habitat for the marbled murrelet should be maintained intact and “in relatively large contiguous blocks.”

94. In 2012, FWS’s Recovery Implementation Team reviewed the continued declines in marbled murrelets and, with high confidence, reconfirmed that the loss of forest habitat was the primary cause of the marbled murrelet’s decline and that Oregon’s murrelet population suffered an increased risk of extinction due to its small population size.

95. In its 2019 5-Year Status Review for the Marbled Murrelet, FWS once again identified the extensive logging of old-growth coastal forests as the primary cause of the murrelet’s decline and recognized that “the threat of continued loss and degradation of suitable nesting habitat remains on Federal and non-federal lands” including “through timber harvest.”

96. In 2021, the Oregon Fish and Wildlife Commission up-listed the marbled murrelet from “threatened” to “endangered” under the Oregon ESA, reflecting that despite nearly three decades of protection under both the state and federal ESAs, and despite implementation of industry best management practices, the marbled murrelet has moved closer to extinction.

### III. The Tillamook State Forest

97. The Tillamook State Forest is home to many critically imperiled animals that depend on intact habitat in old forests, including the threatened marbled murrelet, as well as the northern spotted owl, Pacific fisher, and the red tree vole—all species declining primarily due to habitat loss and fragmentation from logging, clearcutting, and roads.

98. The landforms of the Tillamook State Forest are geologically youthful—primarily comprised of volcanic flows, igneous rock, and derived sediments—and prone to ongoing uplift and erosion. With its high precipitation levels and steep slopes, ranging from 55 to 90 percent inclines, high erosion rates and debris slides are dominant processes on the forest.

99. Flowing below steep slopes in the Tillamook State Forest are rivers and streams that provide habitat for imperiled fishes and aquatic species, including Coho, as well as Chinook salmon, chum, steelhead, coastal cutthroat trout, Pacific lamprey, and freshwater mussels.

### IV. Cook Creek

100. Cook Creek flows west through the southern portion of the Tillamook State Forest within the lower Nehalem River watershed, which covers 18,843 acres in Oregon’s Coast Range and connects to Nehalem Bay and the Pacific Ocean.

101. Cook Creek and its tributaries—including East Fork Cook Creek, Hovevett Creek, and Harliss Creek—are designated Coho critical habitat, and Coho are known to use Cook Creek and its tributaries for spawning, rearing, and migration. Despite Harliss Creek being critical habitat, Coho cannot migrate upstream past a culvert under Cook Creek Road, which is “perched” above the lower river by about 10 feet and prohibits upstream passage. Thus, Coho can use only the lower portion of Harliss Creek below the culvert for rearing and migration.

102. In addition to Coho, Cook Creek also provides spawning and rearing habitat for winter steelhead, fall Chinook salmon, chum, coastal cutthroat trout, and Pacific lamprey.

103. The riparian areas along Cook Creek provide valuable habitat for wildlife, including amphibians, neo-tropical migrant birds, raptors, deer, elk, and other mammals.

104. Cook Creek lies within a non-motorized recreational use zone and provides many recreational opportunities such as hiking, camping, fishing, and hunting.

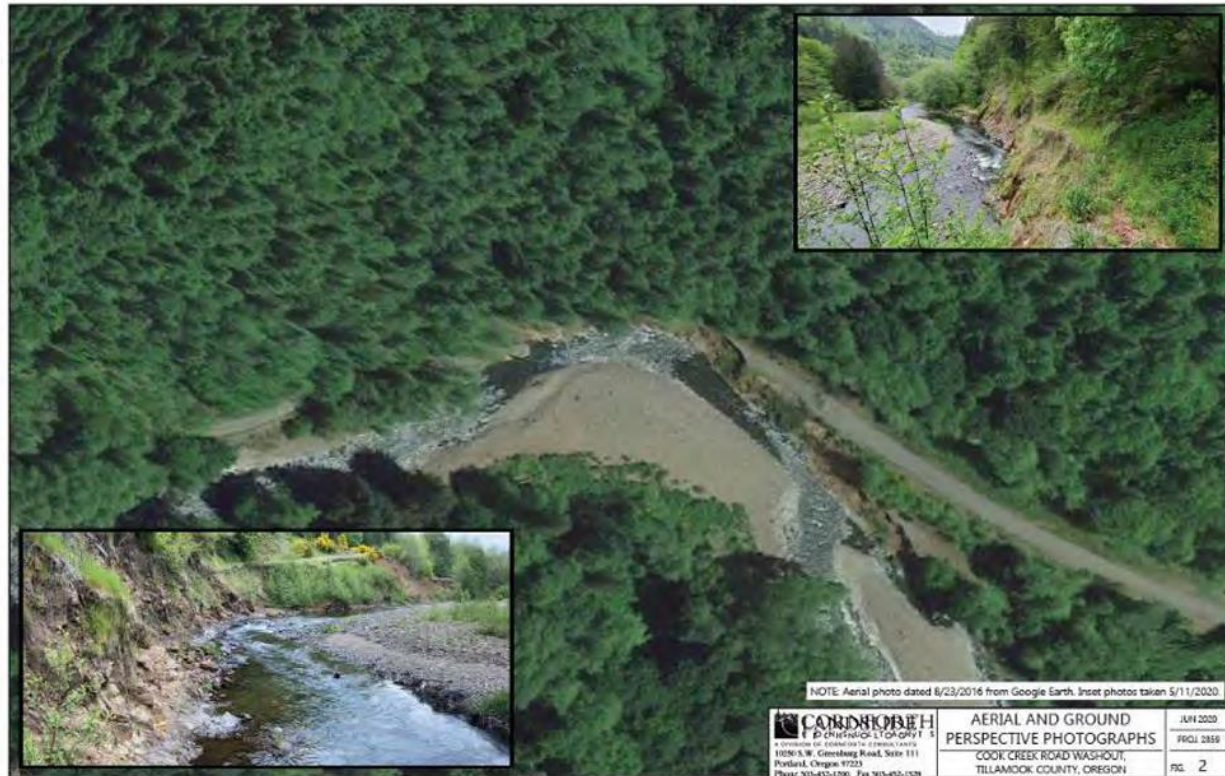
V. Cook Creek Road

105. Cook Creek Road is a gravel road that follows along Cook Creek to the north. It has steep slopes on both sides, and its average width, excluding turnouts, is 16 feet.

106. Cook Creek Road is primarily intended for logging equipment and vehicles, and it has provided access for logging ODF timber sales in the Tillamook State Forest.

107. In late 2015, winter storms brought heavy rainfall that caused Cook Creek to swell. High flows eroded the south shoulder, side slope, gravel roadway, turnout, and north slope of Cook Creek Road, causing a 500-foot segment of road to fail, sending soil and vegetation sliding down the steep slope and depositing heavy sediment loads into Cook Creek, which altered its footprint and flow pattern. The washout occurred about four miles east of Foss County Road and a half mile west of the intersection with Clammer Road, just past where Harliss Creek enters Cook Creek.





108. Since the washout, Clammer Road has provided access to passenger vehicles above the washed-out segment of Cook Creek Road. Logging vehicles cannot use Clammer Road, however, due to the road's narrow 12-foot width and steep adverse grades.

109. Alternate access to the interior Cook Creek basin is available via South Fork Cook Creek Road and East Fork Cook Creek Road to the south, and Buck Mountain and Tin Shack roads off Foss County Road to the northeast. Logging vehicles cannot use these roads because of their 12-foot width, steep adverse grades, and addition of 27 miles and 1.75 hours to a trip that would otherwise take 15 minutes on Cook Creek Road.

110. No timber harvest has occurred in the Cook Creek subbasin since Cook Creek Road washed out in 2015.



VI. The Cook Creek Project

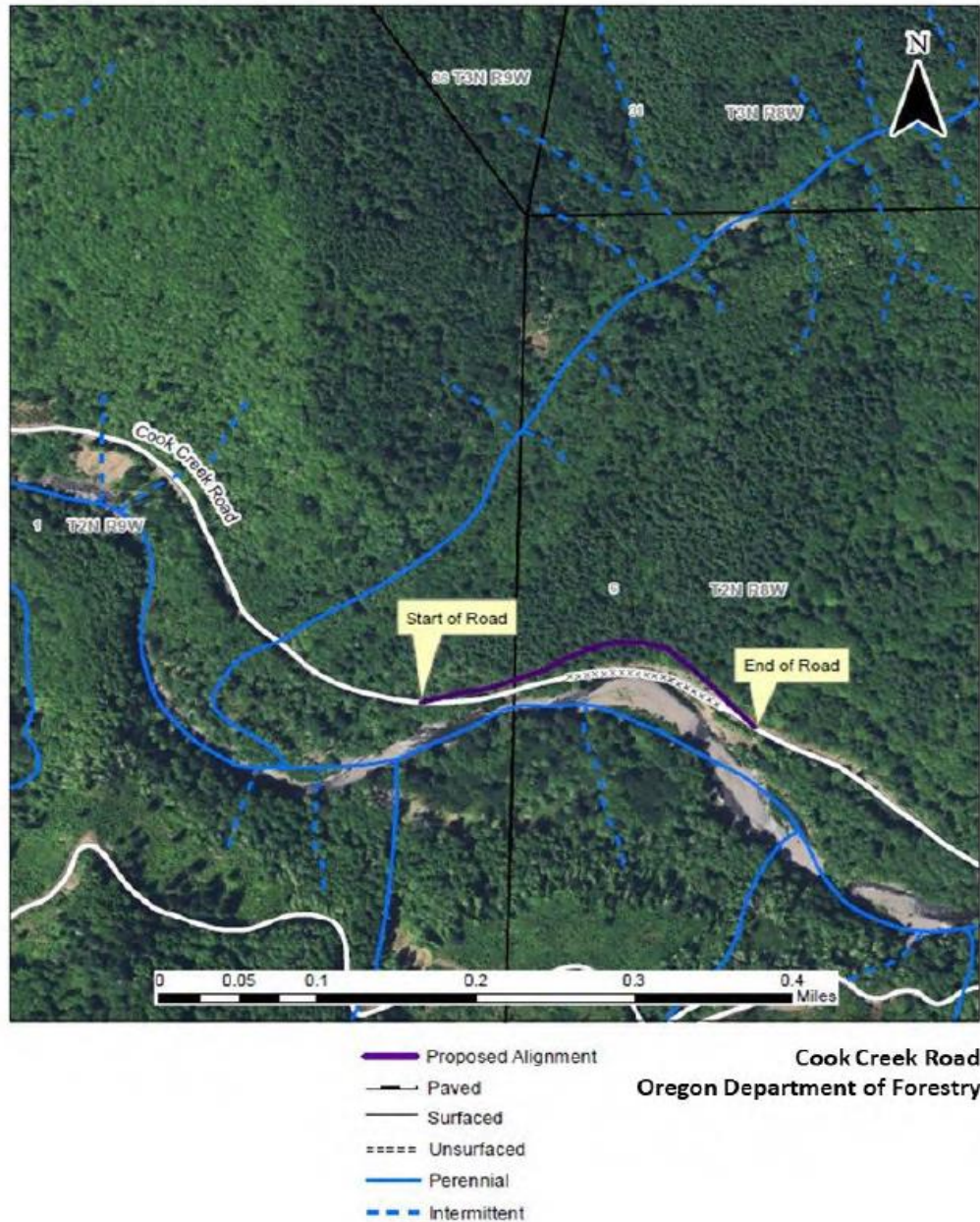
111. ODF applied to FEMA seeking disaster relief funding to rebuild and reopen Cook Creek Road. In 2022, FEMA authorized a grant of disaster relief funding for ODF through the Public Assistance Grant Program under section 406 of the Stafford Act, 42 U.S.C. § 5172, to reconstruct Cook Creek Road—*i.e.*, the Cook Creek Project—so that ODF could restore logging equipment access to the interior forest and resume logging operations in the Cook Creek subbasin, which has been inaccessible to logging equipment since the road washed out in 2015.

112. ODF plans to reconstruct Cook Creek Road by relocating the washed-out segment approximately 130 feet upslope, which will require construction of about 1,900 feet (0.35 miles) of new road, and adding two turnouts along the steep slope above Cook Creek—an area known to be susceptible to mass wasting. The newly constructed roadway will be 16 feet wide with a ditch and will be cut out of the hillside. ODF also plans to vacate approximately 1,400 linear feet of existing road on either side of the washed-out section of Cook Creek Road.

113. Cook Creek Project construction will disturb at least 2.8 acres of soil along the new roadway, which will cross a small drainage (omitted in the map below).

114. The western boundary of the new segment of Cook Creek Road is 590 feet east of Harliss Creek, which is critical habitat for Coho but considered unoccupied due to the impassible “perched” culvert under Cook Creek Road.

115. Slopes in the Cook Creek Project area range from 55 to 90 percent.

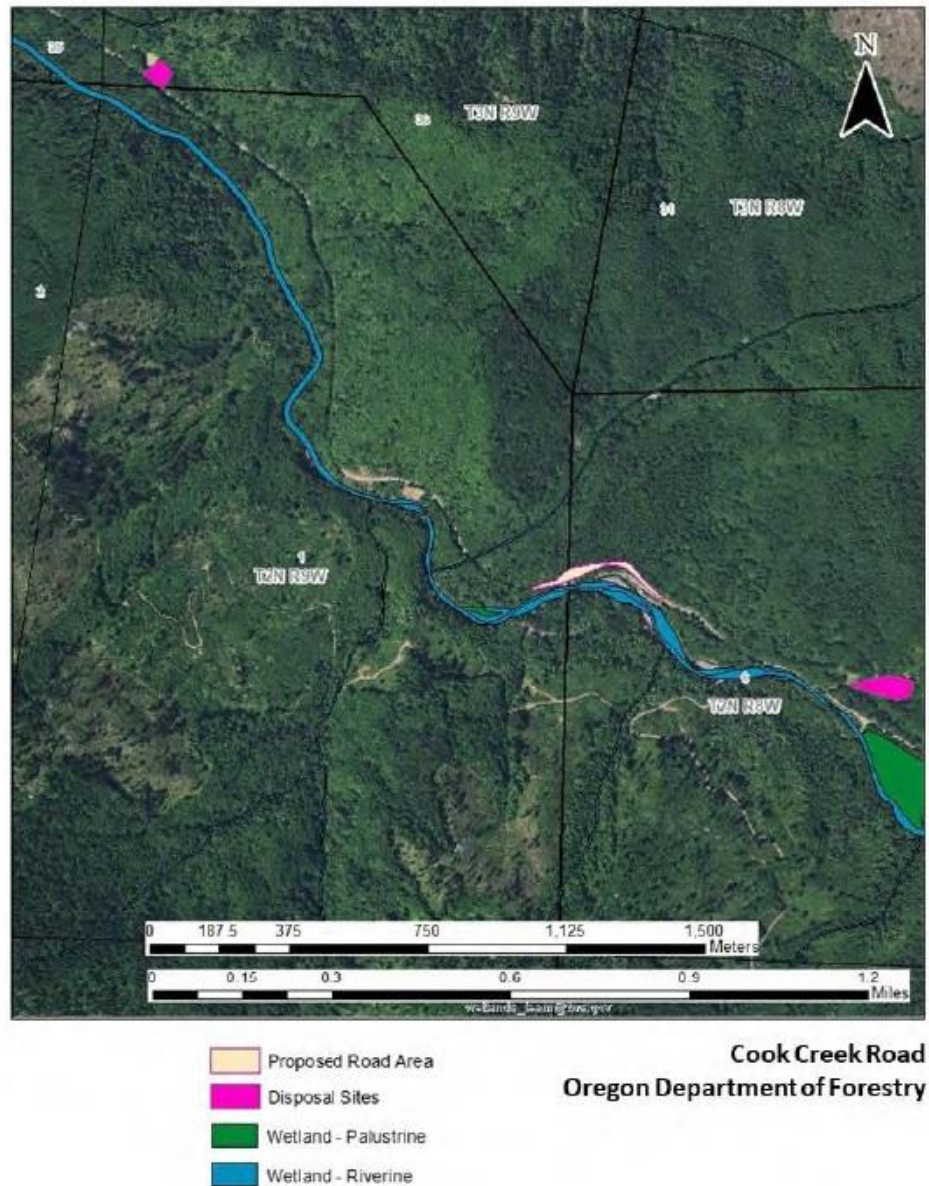


116. Construction is planned to occur over two seasons in 2023 and 2024 from August 6 through October 31—when Coho are typically migrating upstream in Cook Creek to spawn and when marbled murrelets are nesting, feeding their young, and fledging.

117. Construction will involve clearing, grubbing, and brushing—removing all snags, down timber, and brush from 25 feet to 130 feet wide in “cut slope” locations up-slope from the road; installing culverts; excavating cutbanks; filling, grading, and laying gravel surface; and

seeding, fertilizing, and mulching disturbed areas along the roadway. These activities will permanently remove Douglas fir, western hemlock, and red alder along the new roadway, along with western sword fern, vine maple, and salmonberry in the understory layer.

118. ODF will haul waste material to either of two waste disposal sites, shown below.



119. Rock to surface the new roadway will come from an ODF stockpile located about one mile east of the Project site on Cook Creek Road, and from ODF's "Jetty Pit" located about 4.5 miles by road to the east of the Project site.

120. Reopening Cook Creek Road will restore logging access to the Cook Creek subbasin and allow ODF to conduct timber sales (including clearcuts and thinning), road work, and log hauling on steep slopes in the interior coastal forest habitat of the Tillamook State Forest.

121. As outlined in ODF's 2024 Annual Operations Plan ("AOP"), ODF has two timber sales planned and budgeted for 2024 that can only proceed once Cook Creek Road is rebuilt: (1) South Side timber sale, a clearcut of 272 acres upslope along Hoevelt Creek; and (2) Tin Pants timber sale, a clearcut of 407 acres upslope along East Fork Cook Creek. Combined, these sales involve building at least 3 miles of new roads and rebuilding at least 21 miles of roads to support logging equipment and log hauling.

122. All logging activities, road work, and log hauling that are part of the two planned timber sales will occur on steep slopes above Coho critical habitat in the Cook Creek subbasin.

123. These timber sales will impact and degrade Coho critical habitat. Logging and related activities will harm Coho and other aquatic species in the Cook Creek basin by reducing large woody debris and stream complexity and impairing water quality by increasing erosion and sedimentation into streams below steep slopes, particularly along timber haul roads.

124. These timber sales will degrade and remove suitable murrelet habitat. Logging and related activities are also likely to adversely affect the marbled murrelet and its critical habitat by reducing nesting habitat quality and quantity, fragmenting habitat, and harassing and disturbing any nesting marbled murrelets and their young in the area.

125. ODF may prevent public access to facilitate logging these timber sales.



## VII. FEMA's Biological Evaluation

126. In August 2022, FEMA provided a BE of the Cook Creek Project's effects on listed species and requested informal consultation with FWS.

127. In the BE, FEMA did not analyze or even mention any effects from timber sales, logging, clearcutting, road work, or log hauling, which can only occur once logging access to the Cook Creek subbasin is restored by ODF rebuilding the Cook Creek Road.

128. FEMA concluded that the Cook Creek Project would have "no effect" on Coho or Coho critical habitat because there would be "no in-water work," the new roadway segment would be located 130 feet upslope, and the roadway would be buffered by downslope vegetation.

129. As a result of its "no effect" determination for Coho, FEMA did not consult with NMFS under section 7 of the ESA.

130. FEMA admitted that there are five potential murrelet nest trees—three over 125 feet tall and two 100 to 125 feet tall—about 330 feet from the project site, that "murrelets may travel through the Action Area during feeding trips to nests located in the Cook Creek drainage basin," and that "their behavior might be affected by noise and visual construction actions."

131. Despite the possibility that marbled murrelets may travel through the action area and the close proximity of the five potential nest trees, FEMA concluded that the Cook Creek Project is "not likely to adversely affect" murrelets because: (1) construction will not start until August 6, which FEMA erroneously claimed is "outside of murrelet critical nesting season"; (2) construction in "the late nesting season" (August 6 to September 15) will not occur within the dawn/dusk feeding period between two hours before sunset to two hours after sunrise; and (3) during the project construction period, the five potential nest trees are "not likely to support active nesting."

VIII. FWS's Concurrence

132. On September 16, 2022, FWS issued a letter concurring with FEMA's "not likely to adversely affect" for marbled murrelets ("Concurrence").

133. In issuing its Concurrence, FWS relied on FEMA's assessment in the BE.

134. FWS reaffirmed that suitable marbled murrelet habitat occurs within a 0.25-mile radius of the Cook Creek Project area.

135. FWS wrongly reasserted that construction will occur "outside the critical breeding season established for ... murrelets."

136. FWS did not consider the likely adverse effects to murrelets from ODF's planned timber sales and related logging activities that are dependent upon the Cook Creek Project.

137. As a result, FWS concurred that the Cook Creek Project is "not likely to adversely affect" marbled murrelets, finding harmful effects "discountable" because: (1) no suitable murrelet habitat is proposed to be removed, (2) disturbance from noise or construction will not occur in the "critical" breeding season, (3) daily timing restrictions for disturbance will be observed in the "late" breeding season, and (4) murrelets are not expected to be present "in the action area outside the breeding season."

IX. FEMA's Environmental Assessment and FONSI

138. FEMA finalized an EA in October 2022 and issued a Finding of No Significant Impact ("FONSI") for the Cook Creek Project.<sup>2</sup>

---

<sup>2</sup> FEMA specified that the EA applied the CEQ regulations that were in place before September 2020 because FEMA and ODF began working on the EA in early 2020 and, as stated in 40 CFR § 1506.13, the new NEPA regulations apply to any NEPA process begun after that date.

139. FEMA's FONSI relied on the conditions FEMA imposed on the Cook Creek Project, which specified that ODF "shall" implement the Cook Creek Project in compliance with the conditions, best management practices, and mitigation measures, as detailed in the EA.

140. In the EA, FEMA analyzed two alternatives: (1) the proposed action to reconstruct Cook Creek Road, and (2) a no action ("No Build") alternative, for which FEMA assumed that without FEMA funding, ODF would not rebuild the road and retain current conditions by abandoning the washed-out section of Cook Creek Road and restricting access.

141. FEMA defined the project area as "all areas where work would occur," including the road work site, two existing waste disposal sites, and rock sourcing sites. FEMA excluded the impacts of ODF's connected timber sales from the scope of its review.

142. FEMA defined the Cook Creek Project's direct effects under NEPA as those effects caused by the construction of the road segment.

143. Although clearing and brushing activities will range from 25 feet to 130 feet in an unspecified amount of "cut slope" locations, and although ODF will remove all "danger trees, leaning trees, and snags" outside the clearing limits "that could fall into the construction area," FEMA narrowly limited its analysis of clearing and brushing effects to a width of only 50 feet.

144. Even under this narrow analysis, FEMA found that road construction would increase erosion and result in sedimentation in Cook Creek that would require "short- and long-term strategies to minimize." However, FEMA summarily cast any construction-related erosion as "minor" and claimed that ODF's reliance on forest road design, construction, and maintenance standards would minimize resulting effects.

145. Although FEMA also found that the road construction would have an "adverse impact on water quality during the work period," it dismissed the adverse impact as "negligible."

146. Despite acknowledging that Coho use Cook Creek for spawning and rearing, FEMA nevertheless concluded that the Cook Creek Project would have “no effect” on Coho or their critical habitat. In making this conclusion, FEMA relied on ODF’s plan to relocate the roadway 130 feet upslope, buffer with vegetation, and follow best management practices.

147. As a result of its “no effect” determination for Coho, FEMA did not consult with NMFS under section 7 of the ESA regarding the effects of the Cook Creek Project on threatened Coho or their critical habitat in Cook Creek.

148. In stark contrast to its “no effect” determination for Coho, FEMA determined that the Cook Creek Project would have short- and long-term adverse effects on non-listed fish and aquatic life, such as fall Chinook salmon, winter steelhead, chum, coastal cutthroat trout, and Pacific lamprey that spawn and rear in Cook Creek. However, FEMA limited its analysis to effects occurring “during the work period” and dismissed the adverse impacts to fish, aquatic life, and essential fish habitat in Cook Creek as “negligible.”

149. FEMA did not analyze the effects of hauling gravel from the rock sourcing sites or hauling waste to the disposal sites along Cook Creek Road’s steep slopes above Cook Creek.

150. FEMA identified ODF’s work to vacate the existing 1,400 feet of Cook Creek Road adjacent to the damaged section as a “reasonably foreseeable” future action. This work will involve ODF scarifying and “outsloping” the compacted road surface, installing deep water bars every 100 feet for drainage, seeding and mulching disturbed soils, and barricading the road.

151. FEMA also identified ODF’s plan to resume logging activities upstream of the washed-out road segment as a “reasonably foreseeable future action.”

152. The two ODF timber sales currently planned for 2024 and budgeted for by ODF cannot occur if Cook Creek Road is not reconstructed.



153. The two ODF timber sales are cumulative and connected actions that are properly within the scope of the action FEMA is required to consider under the ESA and NEPA.

154. FEMA admitted that ODF's continued use of the rebuilt roadway is expected to be heavy during log hauling periods.

155. FEMA impermissibly discounted the effects associated with "traffic" and road use, including from planned logging activities, as being not "caused by" FEMA's action.

156. FEMA failed to adequately consider or analyze the effects of planned logging activities in both its NEPA and ESA assessments.

157. FEMA's "no effect" determination for Coho and its "not likely to adversely affect" determination for marbled murrelets ignored the adverse impacts of ODF's planned timber sales, including clearcuts, road work, and heavy log hauling.

158. FEMA admitted that the cumulative impacts on water quality, fish, and birds from "reasonably foreseeable" future activities—including timber harvest and road management—were "likely to be major" because they "adversely affect water quality by increasing fine sediment to streams," and because "[h]arvest activities (especially clearcut harvest, retention cutting, and thinning) in unoccupied habitat would be a primary factor adversely affecting [potential] marbled murrelet habitat through reduction in habitat quality and quantity."

159. FEMA's admission and disregard of these impacts is irreconcilable and illegal.

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF (ESA and APA)**

#### **FWS's Concurrence Is Arbitrary, Capricious, and Violates the ESA**

160. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

161. In a letter dated September 16, 2022, FWS concurred that the Cook Creek Project is “not likely to adversely affect” marbled murrelets and their critical habitat.

162. FWS’s Concurrence is a final agency action subject to judicial review under section 706(2)(A) of the APA.

163. FWS’s Concurrence is arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA or its procedures. 5 U.S.C. § 706(2)(A), (D).

164. FWS failed to consider and apply the best available scientific and commercial data available, 16 U.S.C. § 1536(a)(2), and ignored a number of relevant factors including, but not limited to, the harmful effects of road construction while marbled murrelets are nesting, feeding their young, and fledging, as well as the effects of opening access for logging operations in the interior Tillamook State Forest, including planned timber sales with clearcuts on hundreds of acres, new road construction and road maintenance work, and heavy log hauling.

165. FWS’s concurrence should be held unlawful and set aside. *Id.* at § 706(2).

166. Because FWS concurred with FEMA’s “not likely to adversely affect” determination, the agencies did not engage in formal consultation, and FWS failed to determine whether the action, in combination with the environmental baseline and cumulative effects, will jeopardize the marbled murrelet or destroy or adversely modify critical habitat, in violation of the ESA and APA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12, 402.14; 5 U.S.C. § 706(2)(A), (D). Additionally, FWS failed to prepare an ITS, which would have required that adverse impacts be minimized through RPMs, terms and conditions, and monitoring and reporting requirements. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7), (i).

167. These violations of the ESA and APA have caused and/or threaten to cause serious injury to Plaintiffs and Plaintiffs’ members’ rights and interests.

**SECOND CLAIM FOR RELIEF  
(ESA Citizen Suit)**

**Count 1: FEMA Failed to Complete Consultation with NMFS and Ensure that the Cook Creek Project is not likely to Jeopardize Oregon Coast Coho or Destroy or Adversely Modify Critical Habitat, in Violation of Section 7(a)(2) of the ESA**

168. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

169. FEMA's decision to fund the Cook Creek Project is a federal agency action subject to the substantive and procedural requirements of section 7 of the ESA.

170. Section 7(a)(2) of the ESA requires FEMA to consult with NMFS to ensure that the Cook Creek Project is not likely to jeopardize the continued existence of Coho or destroy or adversely modify Coho critical habitat. 16 U.S.C. § 1536(a)(2).

171. FEMA's conclusion that the Cook Creek Project would have "no effect" on Coho is arbitrary, capricious, an abuse of discretion, and otherwise in violation of section 7 of the ESA. 5 U.S.C. § 706(2)(A), (D).

172. FEMA failed to consider and apply the best available scientific and commercial data and information, 16 U.S.C. § 1536(a)(2), and ignored a number of relevant factors, including adverse effects to Coho and critical habitat from Project construction, such as effects from erosion and sedimentation and from hauling waste and gravel along steep slopes above Cook Creek, and ignored the effects of logging, clearcutting, and log hauling above designated Coho critical habitat that would not occur "but for" the Cook Creek Project.

173. Because FEMA concluded "no effect" for Coho, FEMA did not engage in formal or informal consultation with NMFS, and, thus, failed to ensure that the action, in combination with the environmental baseline and cumulative effects, is not likely to jeopardize Coho or destroy or adversely modify critical habitat, in violation of the ESA and APA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12, 402.14; 5 U.S.C. § 706(2)(A), (D).

174. FEMA’s failure to initiate and complete consultation with NMFS on the effects of the Cook Creek Project on Coho before approving funding violates section 7(a)(2) of the ESA, the ESA’s implementing regulations, and the APA. 16 U.S.C. § 1536(a)(2); 5 U.S.C. § 706.

175. FEMA’s “no effect” determination for Coho should be held unlawful and set aside. *Id.* at § 706(2).

176. These violations of the ESA have caused and/or threaten to cause serious prejudice and injury to Plaintiffs’ rights and interests.

**Count 2: FEMA Failed to Ensure Against Jeopardy to the Marbled Murrelet, in Violation of Section 7(a)(2) of the ESA**

177. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

178. FWS’s Concurrence expressly relied on FEMA’s BE, which concluded that the Cook Creek Project is “not likely to adversely affect” the marbled murrelet.

179. FEMA’s decision that the Cook Creek Project is “not likely to adversely affect” the marbled murrelet is arbitrary, capricious, an abuse of discretion, and otherwise in violation of the ESA and APA. 5 U.S.C. § 706(2)(A), (D).

180. FEMA failed to consider and apply the best available scientific and commercial data and information, 16 U.S.C. § 1536(a)(2), and ignored important aspects of the problem by failing to consider all consequences to marbled murrelets that are caused by the action, including the indirect and cumulative effects of road traffic, logging, clearcuts, log hauling, and road construction associated with logging.

181. FEMA’s “not likely to adversely affect” determination for the marbled murrelet should be held unlawful and set aside. *Id.* at § 706(2).

182. FEMA should be required to complete formal consultation with FWS on the Cook Creek Project’s likely adverse effects to the marbled murrelet, consistent with section 7(a)(2) of

the ESA, and adequately analyze the effects of the Cook Creek Project and the effects of logging, road work activities, and log hauling in the interior Tillamook State Forest in order to ensure that the Cook Creek Project is not likely to jeopardize the marbled murrelet or destroy or adversely modify critical habitat in the Cook Creek subbasin.

183. These violations of the ESA have caused and/or threaten to cause serious prejudice and injury to Plaintiffs' rights and interests.

**THIRD CLAIM FOR RELIEF  
(NEPA and APA)**

**FEMA Failed to Take a Hard Look at the Cook Creek Project's Environmental Effects, in Violation of NEPA**

184. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

185. FEMA's funding of the Cook Creek Project is a major federal action subject to NEPA. 40 C.F.R. § 1508.1.

186. NEPA and its implementing regulations require FEMA to take a hard look at all reasonably foreseeable environmental impacts and adverse effects of its actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.1(g). FEMA must analyze not only the direct impacts of the proposed action, but also the indirect and cumulative impacts, and those of connected actions. 40 C.F.R. § 1508.1(g); 40 C.F.R. 1508.25(a)(1).

187. FEMA was required to take a hard look at all reasonably foreseeable environmental effects of the Cook Creek Project, including reconstruction of Cook Creek Road, hauling waste and gravel along Cook Creek Road, and erosion and sedimentation into Cook Creek and its tributaries, as well as the effects of timber sales, road construction, and log hauling in the Cook Creek subbasin within the Tillamook State Forest, which are interrelated and interdependent with the FEMA's action to fund the Cook Creek Project.

188. Despite identifying ODF's planned logging as a reasonably foreseeable future action, FEMA limited its analysis to only the direct effects of reconstructing Cook Creek Road. FEMA improperly excluded from review the effects of the timber sales, including clearcutting, road construction, and log hauling in the interior Tillamook State Forest.

189. FEMA did not adequately consider the effects of hauling waste and gravel along Cook Creek Road on steep slopes above Cook Creek.

190. By ignoring these effects, FEMA's failed to take the requisite hard look at the reasonably certain environmental consequences of the action and is, therefore, arbitrary, capricious, an abuse of discretion, and in violation of NEPA. 5 U.S.C. § 706(2)(A).

191. FEMA's NEPA analysis and FONSI for the Cook Creek Project are unlawful and must be vacated and remanded for the reasons identified above.

192. NEPA requires FEMA to prepare an EIS for the Cook Creek Project, as it is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4, 1502.4.

193. These violations of NEPA have caused and/or threaten to cause serious prejudice and injury to Plaintiffs' rights and interests.

### **RELIEF REQUESTED**

For the reasons stated above, Plaintiffs respectfully request that this Court:

1. Declare that FWS's Concurrence and FEMA's BE are unlawful under the ESA and arbitrary and capricious under the APA;
2. Declare that FEMA's NEPA analysis and FONSI are unlawful under NEPA and arbitrary and capricious under the APA;
3. Vacate FWS's Concurrence and FEMA's BE, NEPA analysis and FONSI;

4. Order FEMA and FWS to complete formal consultation that complies with section 7 of the ESA and APA;
5. Order FEMA to complete an environmental review that complies with NEPA and APA;
6. Enjoin FEMA's and FWS's authorization of Cook Creek Project activities;
7. Award Plaintiffs their reasonably attorneys' fees and litigation costs under the citizen suit fee provision of the ESA, 16 U.S.C. § 1540(g)(4), and/or Equal Access to Justice Act, 28 U.S.C. § 2412 and Fed. R. Civ. P. 54(d), as applicable; and
8. Grant Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted and dated this 17th day of July 2023.

/s/ Margaret E. Townsend

Margaret E. Townsend (OSB # 144463)  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211  
(971) 717-6409  
mtownsend@biologicaldiversity.org

/s/ Nicholas Cady

Nicholas S. Cady (OSB # 113463)  
Cascadia Wildlands  
P.O. Box 10455  
Eugene, OR 97440  
(541) 434-1463  
nick@cascwild.org

*Attorneys for Plaintiffs*